

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

(1) GREAT AMERICAN	§	
INSURANCE COMPANY, an Ohio	§	
Corporation,	§	
Plaintiff,	§	
	§	
v.	§	CASE NO. <u>CIV-23-1013-R</u>
	§	
(1) DOLESE BROS. CO., an Oklahoma	§	
Corporation;	§	
	§	
(2) JENNIFER WITTE, as Personal	§	
Representative of the Estate of	§	
Neil Perry Witte, Deceased,	§	
a citizen of Oklahoma.	§	
Defendants.	§	

COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff Great American Insurance Company (“Great American”), pursuant to Title 28 U.S.C. §§1332 and 2201, files this Complaint for Declaratory Judgment and would respectfully show the court as follows:

I. PARTIES

1. Plaintiff Great American is a corporation organized and existing under the laws of the State of Ohio with its principal place of business in Cincinnati, Ohio.

2. Defendant Dolese Bros. Co. (“Dolese”) is an Oklahoma corporation with its principal place of business in Oklahoma City, Oklahoma. This defendant may be served with process by serving its registered agent for service of process, Phillips Murrah, P.C., Attn: Robert G. O’Bannon. 101 N. Robinson, 13th Floor, Oklahoma City, Oklahoma, 73102.

3. Defendant Jennifer Witte (“Witte”) is a citizen of the State of Oklahoma, and a resident of Canadian County, Oklahoma.

II. JURISDICTION AND VENUE

4. This action involves a dispute between citizens of different states. The amount in controversy exceeds the sum of \$75,000.00, exclusive of interest and costs. Therefore, this court has jurisdiction over this action pursuant to Title 28 U.S.C. § 1332(a).

5. Venue is proper in this judicial district under Title 28 U.S.C. §1391(a) because one or more defendants reside in this district, and a substantial part of the events or omissions giving rise to the claim occurred in this district.

III. BACKGROUND

A. UNDERLYING FACTS

6. This is a liability insurance coverage dispute in which Great American seeks a declaratory judgment that it is not required to indemnify Dolese against a judgment entered against it in a wrongful death lawsuit filed in the District Court of Cleveland County, Oklahoma and styled and numbered *Jennifer Witte, as Personal Representative of the Estate of Neil Percy Witte, Deceased v. Dolese, Dolese Bros. Co., and HDI, SE, formerly known as International Insurance Company of Hannover SE* (District Court of Cleveland County, Oklahoma, Case No. CJ-2020-54) (the “Underlying Lawsuit”). A judgment was entered against Dolese in the Underlying Lawsuit on November 8, 2023, in the amount of \$58,800,000.00 (the “Judgment”).

7. At the time of the incident forming the basis of the Underlying Lawsuit, Dolese was a named insured under the following liability insurance policies issued for the

June 1, 2019 to June 1, 2020 policy period: (a) a commercial general liability policy issued by Travelers Property Casualty Company of America with applicable limits of insurance of \$1,000,000.00 (the “Travelers Primary Policy”); (b) an excess follow-form and umbrella liability insurance policy issued by Travelers Property Casualty Company of America with applicable limits of insurance of \$4,000,000.00 in excess of the Travelers Primary Policy (the “Travelers Excess Policy”); and (c) excess liability policy no. TUE 6-62-77-51-17 issued by Great American with applicable limits of \$35,000,000.00 in excess of the Travelers Primary and Excess Policies (the “Great American Policy”). [Great American Policy, Ex. 1]. The Judgment exceeds the applicable limits of the Travelers Primary Policy and the Travelers Excess Policy.

8. On Friday, November 3, 2023, three days prior to trial in the Underlying Lawsuit, and without Great American’s knowledge or consent, Dolese entered into an agreement entitled High-Low Agreement with Witte in the Underlying Lawsuit (the “Agreement”). [Agreement, Ex. 2]. Dolese did not inform Great American of the Agreement until Sunday November 5, 2023, two days after it was consummated and the day before trial in the Underlying Lawsuit was scheduled to begin. In the Agreement, Dolese, among other things, waived its right to a jury trial, waived its right to an appeal, and agreed to pay Witte a guaranteed sum certain regardless of the outcome of the trial. By entering into the Agreement without Great American’s knowledge or consent, Dolese materially breached the Conditions of the Great American Policy to Great American’s detriment.

B. RELEVANT POLICY LANGUAGE

9. INSURING AGREEMENT, Section I. COVERAGE of the Great American Policy provides in pertinent part:

I. COVERAGE

We will pay on behalf of the Insured “loss” in excess of the Underlying Limits of Insurance shown in Item **5.** of the Declarations, but only up to an amount not exceeding the Company’s Limits of Insurance as shown in Item **4.** of the Declarations....

[Ex. 1, Form TAU 9500 (Ed 11/97) XS, p. 1].

10. Section VI. CONDITIONS of the Great American Policy contains the following pertinent Conditions:

E. Notice of Occurrence

3. You and any other Insured must:

...

c. cooperate with us in the investigation, settlement or defense of the claim or suit; and

...

4. The Insureds will not, except at their own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

[Ex. 1, Form TAU 9500 (Ed 11/97) XS, p. 5].

IV. CAUSES OF ACTION

11. A real and justiciable controversy exists between Great American, Dolese and Witte concerning their respective rights and obligations under the Great American Policy with respect to the Underlying Lawsuit and the Judgment. Great American seeks a

declaratory judgment pursuant to Title 28 U.S.C. §2201, that it is not required to indemnify Dolese for the Underlying Lawsuit and/or the Judgment for the reasons set forth below.

**COUNT I - DECLARATORY JUDGMENT
(Title 28 U.S.C. §2201)**

12. Plaintiff Great American incorporates the allegations set forth in paragraphs 1 - 11 above.

13. Dolese materially violated the Conditions of the Great American Policy, including the without limitation, the Conditions set forth above, by entering into the Agreement, in which it waived its right to a jury trial and to an appeal and agreed to pay plaintiff a guaranteed sum certain regardless of the outcome of the trial, without Great American's knowledge or consent.

14. Great American respectfully asks the Court to declare as a matter of law that:
- a. Dolese materially violated the Conditions of the Great American Policy to Great American's detriment and prejudice; and
 - b. Great American is not required to indemnify Dolese for the Judgment or any payments made by Dolese to Witte pursuant to the Agreement.

V. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, plaintiff Great American Insurance Company respectfully requests that upon hearing and proper proof the court enter declaration pursuant to Title 28 U.S.C. §2201, holding, adjudging and decreeing, that Great American Insurance Policy No. TUE6-62-77-51-17 does not provide coverage for the Judgment; and further that plaintiff Great American Insurance Company has no duty to indemnify defendant Dolese Bros. Co. for the Judgment and the claims asserted against it

by Jennifer Witte, and further requests that it be awarded its costs and attorney fees incurred in pursuit of this declaratory judgment, and any other relief, as this court may deem just and proper.

Respectfully submitted,

By: /s/ Roger N. Butler, Jr.
Roger N. Butler, Jr., OBA No. 13668
Nathaniel T. Smith, OBA No. 31229
SECREST, HILL, BUTLER & SECREST
7134 S. Yale Ave., Ste. 900
Tulsa, OK 74063
Telephone: (918) 494-5905
Facsimile: (918) 494-2847
rbutler@secresthill.com
nsmith@secresthill.com

and

Kevin L. Sewell
(*Pro Hac Vice* Admission Pending)
**MARTIN, DISIERE, JEFFERSON &
WISDOM, LLP**
Texas State Bar No. 00789619
9111 Cypress Waters Blvd., Suite 250
Dallas, Texas 75019
Telephone: (214) 420-5500
Facsimile: (214) 420-5501
sewell@mdjwlaw.com

**ATTORNEYS FOR PLAINTIFF
GREAT AMERICAN
INSURANCE COMPANY**